(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: OCT 0 9 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The AAO summarily dismissed the subsequent appeal and dismissed a subsequent motion to reopen and a motion to reconsider. The matter is now before the AAO on a second motion to reopen and motion to reconsider. The motions will be dismissed. The Director's decision of February 11, 2011 and the AAO's decisions of February 5, 2013 and June 28, 2013 will be affirmed. The appeal remains dismissed and the petition remains denied.

The petitioner is an advertising firm. It seeks to employ the beneficiary permanently[1] in the United States as a marketing specialist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The Form I-140, Immigrant Petition for Alien Worker, was filed on or about August 5, 2010. The accompanying ETA Form 9089 established a November 4, 2009, priority date.[2] The position of marketing specialist as stated on the ETA Form 9089 requires a Bachelor's degree in Business Administration and 60 months (five years) of experience in the job offered or a Master's degree in Business Administration and two years of experience in the job offered. Item 14 of the ETA Form 9089 also required a specific skill defined as the ability "to compose simple business letters."

The director issued a Request for Evidence (RFE) on October 4, 2010, mailing it to the petitioner's address listed on the petition and the labor certification. The RFE instructed the petitioner to submit evidence that the beneficiary possessed at least five years of experience as a marketing specialist[3] as

---

[1] In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

[2] The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the educational and experiential qualifications as stated on its ETA Form 9089 submitted with the visa petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

[3] The regulation at 8 C.F.R. 204.5 additionally states in pertinent part:

> (g) *Initial Evidence*-(1) *General.* . . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training

required by the terms of the labor certification and the requested preference classification. The RFE further instructed the petitioner to submit evidence of its financial ability to pay the beneficiary the $50,377 proffered wage, to include the petitioner's federal tax return, annual report, or audited financial statement for 2009. Finally, the RFE requested evidence of the beneficiary's employment with the petitioner, if any, and noted that the petitioner had not submitted an academic evaluation of the beneficiary's education and a copy of his resume, though these documents were listed in the cover sheet accompanying the petition.

The RFE stated that a response from the petitioner was due by December 27, 2010. The petitioner did not respond to the director's RFE.

On February 18, 2011, the director denied the petition. She found that the petitioner had failed to establish its continuing ability to pay the proffered wage from the priority date onward, and failed to establish that the beneficiary had obtained the required five years of experience as a marketing specialist as required by the terms of the labor certification.

The petitioner appealed the Director's decision to the AAO on March 22, 2011. On Part 2 of the Form I-290B, Notice of Appeal or Motion, the petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. On Part 3 of the Form I-290B, the petitioner simply stated that it did not receive the director's RFE because it had not received it.

On February 5, 2013, the AAO summarily dismissed the appeal. The AAO found, *inter alia*, that no further brief or additional evidence had been submitted in the nearly two years since the appeal had been filed as indicated by the petitioner on Part 2 of the Form I-290B in support of its claim on appeal that the RFE had never been received.

> received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Relevant to five years of progressive experience in the specialty following a baccalaureate degree, the regulation at 8 C.F.R. § 204.5(k) provides in relevant part:

> (3) *Initial Evidence.* The petition must be accompanied by documentation showing that he alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.
>
> (i) To show that he alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post -baccalaureate experience in the specialty.

The petitioner filed a motion to reopen and reconsider the AAO's decision summarily dismissing the appeal. The motion was accompanied by a statement that it was not able to submit documents within the 30 days because it was not really clear what was required and the petitioner was hoping that the AAO would send a specific request.

On June 28, 2013, the AAO dismissed the petitioner's motion to reopen and for reconsideration. The AAO noted in its June 28, 2013, dismissal that the Director's RFE had been mailed to the petitioner's address listed on the labor certification and on the petition, and that the Director's decision denying the petition, which the petitioner received, had been mailed to the same address. The AAO also noted that that the director's decision described in detail the evidence required for petition approval and that the AAO did not accept the petitioner's claim that it was not clear what documents were necessary (footnote 2 of June 28, 2013, AAO decision).

The petitioner has filed a second motion to reopen and motion to reconsider the AAO's June 28, 2013 decision. With the motion, the petitioner submits a copy of its federal income tax return for 2011, which is dated February 1, 2012 and a copy of its federal income tax return, which is dated March 25, 2013. In a statement from the petitioner's CEO, these documents are submitted because the AAO "mentioned" the petitioner's failure to establish its ability to pay and the beneficiary's experience[4] in the June 28, 2013, decision.

The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The petitioner's filing does not qualify as a motion to reconsider because it is not supported by pertinent legal authority showing that the AAO's June 28, 2013, decision was based on an incorrect application of law or USCIS policy. The AAO's decision of June 28, 2013 dismissed the petitioner's first motion to reopen and reconsider the summary dismissal of the appeal because it rejected the petitioner's explanation that it did not submit any further documentation to the AAO on appeal because it did not understand the documentation required. The petitioner's second motion to reconsider has failed to demonstrate that the AAO's decision in this respect was incorrect. The petitioner's submission of two federal tax returns that were not created until after the petitioner had filed its appeal do not form the basis of a motion to reopen or motion to reconsider. They do not address the basis for the AAO's dismissal of the petitioner's first motion to the reopen and reconsider issued on June 28, 2013.

---

[4] The petitioner also claims to be submitting the beneficiary's employment documentation with this motion, but it is not present in the submission. Further, even if these federal tax returns were considered in support of the petitioner's ability to pay the proffered wage in this time period, which they will not, there is no other evidence of the ability to pay the proffered wage in 2009 or 2010.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The petitioner's 2011 and 2012 tax returns are not considered newly discovered evidence pertinent to the present proceeding because they were not created until after the petitioner filed an appeal. Based on the foregoing, the petitioner's motions do not qualify as a motion to reopen or a motion to reconsider and will be dismissed.

ORDER: The prior decision of the Director on February 18, 2011, and the AAO decisions of February 5, 2013, and June 28, 2013, are affirmed. The appeal remains dismissed and the petition remains denied.